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## THE CORPORATION AS A FORM OF COLONIAL GOVERNMENT. I.

### *I. The Classification of Colonial Governments.*

NEARLY a century and a half ago William Blackstone propounded his classification of English colonial governments. "With respect to their internal polity," said he, "our colonies are properly of three sorts": provincial establishments, proprietary governments, charter governments.<sup>1</sup> The constitutions of the first class, he said, rested on commissions issued by the crown to the governors, and the instructions which accompanied them; while the proprietary grants were of the nature of feudal principalities, and the charter governments were civil corporations. This classification has been expressly or tacitly accepted by all later writers: no serious effort has been made, at least in a public way, to improve on Blackstone's treatment of the subject. Yet it may be suggested that there are faults in the classification, which impair its usefulness and tend to conceal the true character of English colonial governments.

Blackstone was undoubtedly correct in basing his classification on the internal polity of the colonies. His inquiry was directed toward the source of power within the colony, and the way in which it was there exercised; and these are the facts which, if brought out, enable one to determine the character of a political system. For the purpose which he, or any other investigator of the subject, has in view, it makes no difference whether the inhabitants of the colonies stood in a mediate or an immediate relation to the king. The form of colonial government is not determined by the nearness or remoteness of royal control.

<sup>1</sup> Commentaries, Introduction, section 4.

Still, though he had the right principle, it seems to me that Blackstone's classification is faulty in two respects: (1) The term charter government, which he has employed, is loose and inexact, and the use which he has made of it increases rather than relieves the confusion. (2) Instead of three forms of colonial government there are only two, the corporation and the province.

Addressing ourselves to the first point of criticism, a little thought should make it evident that the word charter can never properly be used to describe a form of government. The charter is a document used for the transmission of rights and powers. It was employed for this purpose by the Roman imperial government and by the papal curia, and from these sources it was adopted and came into use among the states of mediæval and modern Europe. Since its introduction by the Roman priesthood into England it has been used by the crown for the conveyance of powers in great number and variety. The grantees have been both laymen and ecclesiastics. Land and territorial privileges, rights of trade and subordinate rights of government have been bestowed by the use of this document. Some of the grants have carried with them corporate privileges; many more have not. Many have been charters of immunity, exempting the grantees from suit at court, from the payment of specified dues or from other obligations. Not a few have been charters of pardon. By charter rights both public and private have been indiscriminately conveyed. Not until the thirteenth century, says Sir Duffus Hardy,<sup>1</sup> does this form of document appear in distinction from the patent and deed, as the evidence of the most solemn acts of grant. It has been issued in favor not only of individuals, but also of communities; while in some instances it has contained a grant in favor of the whole kingdom. Only a reference to the Charter of Liberties of Henry I, to the Charter of Forests, to *Magna Charta*, is needed to indicate the exalted public uses to which this instrument was put in mediæval England.

<sup>1</sup> Rotuli Chartarum, in Turri Londoniensi, Introduction. English Record Commission, 1837.

These familiar facts, and many others which might be cited, show that the word charter conveys no definite idea about the kind of powers transmitted, or the way in which they are exercised, or the source whence they come. It has reference solely to the kind of document used in the transmission. If used to convey powers to a municipality, it alone would not distinguish the rights thus bestowed from a grant of privileges to a baron, to a bishop, to a monastery ; or, in later times, from those granted to a trading company or a bridge company. Therefore it would seem that the word charter, as a descriptive term, has no proper place in a classification of forms of government. It conveys an idea no more precise or germane to the subject than would the word constitutional, if used in a similar connection or for a similar purpose.

Moreover, Blackstone uses the term arbitrarily. When the crown employed agencies in the work of colonization, powers and rights were conveyed to them by charter. Two such agencies were employed, the corporation and the proprietor. Both received charters. The proprietary province originated through the delegation of powers by charter just as truly as did the corporation ; and if the term charter government is to be used as descriptive of the one, why should it not be so used of the other ? But that cannot be done, for it would confound two systems of government which are essentially unlike. Blackstone's definitions show that he was aware of this unlikeness : the one system, he said, was of the nature of a feudal principality, while the other was a civil corporation. Possibly it was for this reason that he confined the term charter government to the corporation. But the fact that, if used at all, its meaning must be arbitrarily restricted, furnishes another argument for its rejection.

In support of the second objection to Blackstone's classification I shall attempt to show in this and in subsequent papers that there are but two distinct forms of colonial government in the English system, the corporation and the province. Under the corporation I include those colonies which themselves became corporations. There were three such, and

only three — Massachusetts, Connecticut and Rhode Island. They form a class by themselves, and through their organization and development give character to the history of New England. Under the term province I include all the other colonies — those which were founded and controlled by trading companies resident in England, as well as those settled by proprietors and those which were governed directly by the king. In drawing this line of distinction, imperial control as such has been left out of sight. So far as possible attention has been strictly confined to the internal organization of the colony. In the case of the corporations this can easily be done, for they were by nature essentially independent and self-sufficing. The proprietor, and the company considered as a proprietor, were in a certain sense distinct from the colony, though constituting a most important part of it, and transforming it into the province. They existed prior to the colony and derived their authority from a source outside of it. Though their prosperity depended on its growth, their rights and privileges descended, in the one case to heirs and assigns, in the other to successors, and that independently of the colony. They were intermediaries between it and the king, and thus had relations which the colony had not. The relations between proprietors and the king, or the way in which control over the proprietors was exercised, it is not my purpose to discuss in this connection. To the relations between the proprietor and the province, and to these alone, is the reader's attention now invited.

While the power of the proprietor was coterminous with his proprietorship, the kingly office was vastly higher and more inclusive. When America was settled the King of England was the possessor of three crowns. Potentially, then, he was emperor; and as the dominions across the sea increased in number and extent, the imperial element in the office became more prominent. But this monarch was at the same time the proprietor of a number of American provinces. It is in his proprietary relation to them, and to each of them separately, that his position will be discussed in these papers. It

will then be seen that the king occupied toward each of these dominions a position similar in all respects to that held by the proprietors toward their respective provinces.

## II. *The Colonial Corporation.*

In order to trace the origin of the colonial corporation it is not necessary to go back beyond the companies of Merchant Adventurers which, in the late sixteenth and early seventeenth centuries,<sup>1</sup> were created by royal grant in considerable numbers. Each of these companies received exclusive rights of trade with a specified region or stretch of coast with which Englishmen had established, or hoped to establish, commercial relations. The Muscovy Company, the Levant Company, the Eastland Company, the Guinea Company, and others of their class, are more or less familiar to students of English commercial development in the age of the Tudors and Stuarts. But of them all the East India Company was the one destined to have the greatest career, and to become in the popular mind the representative and type of the class. A reference to its organization under the first charter will furnish a clue to the line of investigation which must here be followed.

The patentees were by the charter of 1601<sup>2</sup> incorporated under the name of the "Governor and Company of Merchants Trading into the East Indies." They had the right to increase their number by the admission of freemen to the "fellowship." General administrative power was intrusted to a governor, or deputy, and twenty-four elected members, called the committee. The first governor (Sir Thomas Smith) and the first members of the committee were named in the charter and were to hold office for one year. Thereafter they were to be elected yearly

<sup>1</sup> For the evolution of Merchant Adventurers' Companies from the Gild, see Gross, *Gild Merchant*, vol. i, pp. 125 *et seq.*, and literature there referred to. Important documents are printed in Schanz, *Englische Handelspolitik*, vol. ii. Busch, in *England unter den Tudors*, vol. i, treats briefly but suggestively the earlier history of the Merchant Adventurers.

<sup>2</sup> See *Charters and Grants of and to the East India Company*, a volume apparently issued by the company itself, but without date. (Astor Library.)

by the company, and when chosen were to take an oath of office. Provision was also made for a general court, consisting of all the members of the company who might attend, to meet for the purpose of electing officers and transacting the general business of the corporation. In this court the governor or deputy must always be present; and when organized with one of these officials at its head it was the source of authority within the company. By the charter of 1609 no changes, save in details, were made in the plan of organization. This plan, as will be seen, was substantially the same as that upon which the most important companies engaged in American colonization were formed; but a comparison between their charters and that of the East India Company will reveal at once the wide difference in the purpose for which they were created. In the case of the East India Company trade is expressly stated to be the object; and although the power to buy, hold or dispose of land is given, the exercise of that right is wholly subordinated to purposes of traffic. Governmental powers, save in the very limited form necessitated by the character of the grant, were not bestowed.

So far as form of organization is concerned, the English companies which were engaged in the colonization of North America subsequent to 1609 were, with one exception, similar to the East India Company. In fixing the boundary line at 1609 the intention is to exclude from this class the grant of 1606 to the London and Plymouth patentees, while the company referred to as an exception is the New England Council of 1620. Let us now trace somewhat in detail the evolution of these corporations, for the purpose of comparing the forms which appear, and of thus clearing the way for the study of the corporate colony. I shall begin with the grant of 1606 in order to show its extraordinary and essentially transitional character, and by so doing to gain the correct point of view for the later investigation.

Of the grants affecting North America those made by the English crown previous to 1600 were mainly for purposes of discovery. They were rudimentary, and for the most part proprietary in form. With the grant of 1606 the first attempt

was made by the crown to regulate somewhat in detail the settlement and government of a colony. What was the result? Two groups of patentees, most of whom were or had been soldiers, one group resident at London and the other at Plymouth, were the recipients of the grant. They are called in the charter "the first colony" and "the second colony," respectively; also "adventurers"; while under the name of "associates" they were permitted to admit others to a share in the enterprise. None of the usual words of incorporation appear in this charter; and the only evidence which I have been able to find in the document itself that the grantees were incorporated is the name "colony," which is given to each group, and the use in the preamble of the word "companies," this referring also to the patentees. In the first set of instructions issued by the king concerning this enterprise—and the only set preserved<sup>1</sup>—it is said that the king had "given license" to sundry of his "loving subjects" and "to their associates," "to deduce and conduct two several colonies or plantations" of settlers to America. Here the word colony is used in its ordinary meaning, and not in what would appear the unusual sense of the name of a corporation. The records of the acts of these patentees are not extant. So far as observed none of the contemporary references to them give decisive information upon the question as to corporate capacity. If, then, these companies were corporations, as they have generally been considered to be, and as they probably were, the positive evidence of the fact is slight. If Sir Edward Coke drew this patent, he certainly put into it the very fewest words that were necessary for the conveyance of corporate power.<sup>2</sup>

<sup>1</sup> Alex. Brown, *Genesis of the United States*, vol. i, p. 65.

<sup>2</sup> Capt. John Smith, who claims to have aided in procuring this charter, calls the patentees a "company." See *New England's Trials*, 2d ed., in Arber's edition of Smith's Works, p. 266. Gorges, in his *Brief Narration*, always refers to them under the name of colony. See Baxter, Gorges and his Province of Maine, vol. ii, pp. 12 *et seq.* But when in 1619 a dispute arose between the Plymouth patentees under this charter and the London Company as it then was, the former were referred to as a company both by Gorges and by Sir Edwin Sandys. *Colls. Va. Hist. Soc.*, vol. vii, p. 27. The Turkey or Levant Merchants were first chartered as a partnership (1581), and in 1592 were incorporated. Hakluyt, *Collections*, vol. ii, pp. 263, 434.



Coming to the rights and powers granted in 1606, we find that the grant of land was made in form similar to that used in the charters of discovery. It was a grant of permission to settle within a specified territory. The choice of a place for actual settlement was to secure to the patentees the possession of a tract one hundred miles square, so located that the settlement should lie at the middle of the eastern or coast line of the tract.<sup>1</sup> Since with two groups of patentees presumably at least two colonies would be established, and since a middle region three degrees broad was left open to their joint settlement, the further provision became necessary that the colonies should be placed at least one hundred miles apart. But this bestowment of land was not made in such way that the patentees could grant it out to settlers. In the eighteenth and nineteenth clauses of the charter it was provided that such grants should be made by the king through letters-patent under the great seal, and to those persons in whose behalf a petition should be presented by the council of the colony in which they were resident, or with which they were connected. This provision, we may suppose, was introduced with a view to the maintenance of the communal system, both of trade and agriculture, which we know was kept up for several years at Jamestown, and which the instructions show the king to have commanded and approved.<sup>2</sup>

Another peculiarity of this system was that, although the right to transport settlers and their supplies into the colonies, with the power to defend them, was given to the patentees, the right to trade with them was given only by implication, and that not to the exclusion of outsiders.<sup>3</sup> But of special importance is the fact that by the charter of 1606 no governmental powers whatsoever were bestowed on the grantees. Instead, provision was made for three councils, one resident in England and one in each of the two colonies. The first was called the

<sup>1</sup> Islands within one hundred miles of the coast were also granted.

<sup>2</sup> Brown, vol. i, p. 71.

<sup>3</sup> See articles eleven to fourteen of the charter as printed in Stith's *History of Virginia*.

Royal Council for Virginia. Its members were appointed by the crown. The charter provided that they should be thirteen in number, but the first instructions reveal the fact that there were fourteen, and by a royal ordinance issued in March, 1607, the number was increased at the request of the patentees to forty, or perhaps more.<sup>1</sup> In both these documents, also, it was stated that the king might increase or change the membership at will. This council was then his creature, though, so far as is known, its members were patentees. Each of the other two councils consisted of thirteen members, appointed by the Royal Council under instructions from the king, but endowed with the power to choose their own president. They likewise, being planters, were either patentees or closely connected therewith.

Through these three bodies the king governed the colonies. Each council had a seal, which was the seal, not of the patentees, but "of the king for his council." To the Royal Council was given control "of and for all matters that shall or may concern the government," not only within the colonies, but throughout the territory between the thirty-fourth and the forty-fifth parallels. To the local councils was given power to regulate the internal affairs of the colonies in pursuance of such instructions as should be issued for them under the sign manual and privy seal of the king. The oath which was formulated for the president of the local council contained a promise of fidelity not to the patentees, but to the king.<sup>2</sup> The king himself prescribed what judicial powers the local council should exercise and how they should be exercised, decreed what punishments should be inflicted for the more serious offenses, and authorized the president to reprieve but not to pardon.<sup>3</sup> Thus the colonies were to be governed under the immediate direction of the crown, and through bodies which in origin and function were distinct from those to which the charter was granted.

As soon as the scheme was put into operation, the king and his councils appear to have carried their interference even

<sup>1</sup> Brown, vol. i, pp. 66, 92 93.

<sup>2</sup> *Ibid.*, vol. i, p. 78.

<sup>3</sup> *Ibid.*, pp. 69 *et seq.*

beyond the sphere of government, and to have controlled the work of colonization to a most important extent. The writings of John Smith and others show that the council at Jamestown regulated all the affairs of the settlement, economic as well as governmental. This was, in fact, unavoidable, because of the communal system which prevailed there and of the great importance which, under such conditions, attaches to matters of an economic and social character. The king prescribed the mode of carrying on trade; the Royal Council ordered Captain Newport to spend two months in discovery, and to load his ships with products of the country for their return voyage; while under the form of "advice" it gave minute instructions about the selection of a place for settlement, the building of the town, the work of exploration, and the opening of relations with the Indians.<sup>1</sup> In the charter the councils were empowered to discover and operate mines, and to issue a coin for use in the colonies. Thus, under the charter of 1606 the organs of government tended to draw to themselves the entire control of the enterprise. If that had been fully carried out, a royal province or provincial system must have been the result. In that case, had a number of colonies been founded, the Royal Council might have developed into a board of general control subordinate to the Privy Council.<sup>2</sup> As we shall see, affairs did not develop in that direction; but in some direction they had to develop, for the system of 1606 was confused and without self-consistency. If a corporation was then actually created, it was not endowed with powers sufficient to enable it to accomplish its purpose. If, on the other hand, the object was to create a royal province, of what use were the patentees? This unnatural union was soon broken, the corporate principle triumphed, and a self-consistent system was the result.

<sup>1</sup> Brown, vol. i, pp. 71, 79.

<sup>2</sup> When, in May, 1625, Charles I proclaimed the establishment of a royal provincial system for Virginia, he announced that the control over its affairs would be intrusted to a council of his own appointment in England, and to another subordinate council resident in Virginia. A comparison of this with the charter of 1606 will show how strongly provincial was the system created by that document. Rymer, *Fœdera*, vol. xviii, p. 72.

The change was effected through the charters of 1609 and 1612. By the former the process of incorporating the London patentees was completed. By the strongest possible words of incorporation they were made "The Treasurer and Company of Adventurers and Planters of the City of London for the first Colony in Virginia." All who were at that time adventurers were named in the patent. The seal was now to be the company's seal. A territory four hundred miles broad, and extending through the North American continent, was granted to the company, with power to grant the same under its seal to adventurers and settlers. The authority to transport emigrants, to carry on trade, to defend the territory, even with the enforcement of martial law in cases of mutiny or rebellion, was renewed. The company also received the organization necessary for the exercise of such powers. Provision in the first place was made for a treasurer and his assistant, the deputy-treasurer. The former was not only empowered to call the meetings of the company, but, as the records show, was in all matters its executive head. He presided at its meetings, carried on much of its correspondence, managed the important business which it had to transact with the crown, made annual reports to the company concerning all its transactions for the year, and laid before it plans for future enterprises. To guide the policy of a large corporation like the London Company, engaged in so difficult an enterprise as it had undertaken, was enough to tax heavily the powers even of such men as Sir Thomas Smith and Sir Edwin Sandys. In addition to the treasurer and his deputy there was a corps of subordinate officials, such as would be found in any large business house — auditors, a secretary, book-keeper, cashier, husband and beadle. Provision also was made in the orders of the company for numerous special and standing committees.

Since the more important of these offices were elective and since the incumbents acted by advice and under authority, periodical meetings of the company were necessary. Provision was made in 1609 for a court, and its organization was completed in 1612. It was called the "great and general

court," and met quarterly during the law terms. It was, or might be, attended by all the members of the company, both the officers and the "generality." In this court by majority vote, and in most cases with the use of the ballot, the officers of the company and of the colony were elected. It was also the ultimate source of authority within the company. To it all matters were, or might be, referred for final decision, and the records bear evidence that a large amount of business was done in the general court during the later years of the company's history. Provision was also made for ordinary courts. These usually met once a fortnight, and must be attended by at least five councillors and fifteen of the generality. They were called by the treasurer, and were "sufficient for handling . . . all such casual and particular occurrences . . . as shall from time to time happen touching and concerning the said plantation." Every Monday before the meeting of the general court the ordinary court met to prepare business for it. This session was commonly known by the name "preparative court."

Up to this point I have been describing the organization of the London Company for business purposes. What provision was made respecting the exercise of governmental powers? The Royal Council of the charter of 1606 was retained under the name: "Our Council for the said Company of Adventurers and Planters in Virginia."<sup>1</sup> From the records we learn that it had a seal. Upon it governmental powers were bestowed. In 1609 it was authorized to establish offices and determine their titles, to provide forms and ceremonies of government, to appoint officers, to issue such orders and instructions<sup>2</sup> as were necessary for government within the colony and on the outward and return voyages. These it might change or revoke. The councillors were to take the oath of office before the lord chancellor, the lord high treasurer or the lord chamberlain. The first set of councillors — all patentees — was named in the charter.

<sup>1</sup> Orders and Constitutions, p. 10. Reprinted in Force's Tracts, vol. iii; Records of Va. Co., vol. i, p. 133.

<sup>2</sup> See also Orders and Constitutions, p. 10.

So far there had apparently been no deviation from the earlier system.<sup>1</sup> But provision was made in the charter of 1609 that vacancies in the council should be filled by the company. By this process the council must in time become the creature of the company. This seems in fact to have been the method by which the corporation came into possession of governmental powers. The effect of this upon the council was to make it the permanent administrative body within the company.<sup>2</sup> The treasurer or deputy called it together,<sup>3</sup> and the former was the custodian of its seal. The *Records* and other authorities show that the council sent instructions<sup>4</sup> to the governors, and that with the treasurer it carried on much of the company's correspondence.<sup>5</sup> When charges were made against officials, as Governor Argall, it held preliminary hearings, and prepared the case to be laid before the general court.<sup>6</sup> It examined standing orders, which it was proposed to put into force in the colony, before they were presented to the king for his approval.<sup>7</sup> It considered proposed changes in the patent, and in general all business in which the king was likely to be concerned.<sup>8</sup> It deliberated upon the tobacco question, and the rate of salaries to be paid to officials in Virginia.<sup>9</sup> A part of the council was appointed

<sup>1</sup> "First you shall understand that his majesty hath granted us an enlargement of our charter with many ample privileges, wherein we have knights and gentlemen of good place named for the King's Council of Virginia to govern us." "Nova Britannia," p. 23, in Force, Tracts, vol. i.

<sup>2</sup> Evidence that the *personnel* of the council soon began to change, and that it came to occupy the position here described, appears in articles 6 and 7 of the charter of 1612, as printed in Stith's Virginia. In the *Records* appear occasional instances of election of members to the council by vote of the company. Colls. Va. Hist. Soc., vol. vii, pp. 46, 106, 120.

<sup>3</sup> Charter, article 10; Orders and Constitutions, p. 9.

<sup>4</sup> The Orders and Constitutions state that "all instructions to the governor and council, and all other principal officers in Virginia, shall proceed from the council, and under their hand and seal, . . ."

<sup>5</sup> Brown, *Genesis, etc.*, p. 488. Complaint was made in 1619 against Governor Yeardley because he directed all his letters to the council and none to the company. Colls. Va. Hist. Soc., vol. vii, pp. 48, 53; also 168, *etc.*

<sup>6</sup> Colls. Va. Hist. Soc., vol. viii, pp. 29-38, 45, 47.

<sup>7</sup> *Ibid.*, vol. vii, pp. 33, 86.

<sup>8</sup> *Ibid.*, vol. vii, pp. 17, 98, 109, 113, 186, *etc.*; vol. viii, pp. 23, 46.

<sup>9</sup> *Ibid.*, vol. viii, pp. 68, 96; vol. vii, pp. 112, 119.

on a committee to prepare the acts of the first Virginia assembly for final consideration by the company.<sup>1</sup> It issued broadsides, relations and the other publications of the company.<sup>2</sup> The "Orders and Constitutions," in fact, state that at the call of the treasurer or his deputy the council should meet and give faithful advice in all matters tending to the advancement of the plantation, and especially concerning the making of laws and constitutions. The religion of the colonists and the conversion of the natives were to be its peculiar care. Sometimes committees were associated with it, or prepared business for it. Sometimes the council reported to an ordinary court,<sup>3</sup> instead of laying matters directly before the quarter court. So important was the council that the whole organism usually went by the name: The Treasurer, Council and Company.<sup>4</sup> But the evidence contained in the *Records* abundantly proves not only that the corporation directly exercised governmental power, but that it was the source whence that power was immediately derived.<sup>5</sup> The "Orders and Constitutions" also clearly show that in the quarter courts officers were to be elected, laws and ordinances passed, lands in Virginia disposed of, and all matters of trade settled. These constitutions say:

<sup>1</sup> Colls. Va. Hist. Soc., vol. vii, p. 56.

<sup>2</sup> Brown, *Genesis, etc.*, pp. 337, 439, 445, 463, 761, 775, 797. The more important pamphlets concerning the early history of Virginia, which have been reprinted by Force in his *Tracts*, were published by order of the council. "Nova Britannia" was addressed to Sir Th. Smith as treasurer and one of the council. Force, vol. i. See Smith's *Works*, Arber's edition, p. 522, "A Declaration of the Lottery published by the Council." Smith, when he was apparently preparing his *Generall History*, received for his enterprise the commendation of the company. Colls. Va. Hist. Soc., vol. vii, pp. 113 *et seq.*

<sup>3</sup> Colls. Va. Hist. Soc., vol. viii, p. 96. The only record we have of a session of the council relates to that held in December, 1622, to inquire into the cause of the denunciatory language used by Mr. Wrote against the treasurer and deputy because of their alleged misconduct in relation to the famous tobacco contract. A report on this was made to the company, and it excluded him from the council and suspended him from membership in the corporation. Colls. Va. Hist. Soc., vol. viii, pp. 48-55, 73, 82.

<sup>4</sup> *Ibid.*, vol. viii, pp. 24, 26, 786, *etc.*

<sup>5</sup> The letters printed in Neill's *History of the Virginia Company*, pp. 223 *et seq.*, also prove that, at least in the later years of its history, the company corresponded freely with the authorities in the colony, and they with it. Waterhouse's *Relation*, concerning the massacre of 1622, was dedicated to the company. Neill, p. 334.

No laws or standing orders shall be made by the company but in this manner: First, after the proposing of them in court, they shall be referred to the examination of a select committy. The committies shall present their labors to the view of the council. The council approving them, they shall be brought to the court of preparation on the Monday before the quarter court and openly read. And lastly, they shall pass the judgment of the quarter court.

We have now seen what the London Company was in its fully developed form. It was a body politic endowed not only with land and rights of trade, but ultimately with powers of government, and with the right to increase at will its own membership. This we may call the London type of company, which had developed out of the system of 1606 by the merging of the council in the corporation.

We come now to consider an organization of a different type. The Plymouth patentees of 1606 continued under the old charter till 1620. During the interval colonization was attempted by them at Sagadahoc and failed: thereafter only fishing voyages and voyages of discovery were undertaken. Finally, some of the patentees asked for a definite grant of territory and incorporation as his "majesty's council," the number of which should never exceed forty.<sup>1</sup> The request was granted, and the result was the formation of a new company under the name: "The Council established at Plymouth in the County of Devon for the Planting, Ruling and Governing of New England in America." The strongest words of incorporation were used, and the territory between the fortieth and forty-eighth degrees of north latitude, and extending through the continent, was bestowed, with power to grant it out to settlers. The customary rights of settlement and trade were given, though in a somewhat detailed and monopolistic form. Powers of government were also bestowed, and in much the same language as was used in the London charter of 1609. The right was given to constitute offices, to abolish or change the same, to appoint and remove officials, as well those in England as those employed in the colony, and to issue instruc-

<sup>1</sup> N.Y. Col. Docs., vol. iii, p. 3.



tions for the guidance of magistrates in New England. An official oath was to be formulated for administration to those in the plantation service, and also a judicial oath to be used in examinations touching the plantation or its business.

But the New England council is interesting in the present connection chiefly because of its name and its organization. In name it was the same as the Royal Council for Virginia. In number of members the two were not unlike. The members of both were required to take an oath of office before the lord chancellor, the lord high treasurer or the lord chamberlain. In both cases they were the grantees of governmental powers. But in the London system of 1609 the council, though originally distinct, became merely a part of the corporation, losing thereby its separate existence. In the New England system the council was the corporation, and thus was the grantee of all powers. The two were closely joined, as they were under the London charter, but the corporation was merged in the council, the latter holding the chief place and giving character to the system. This council, then, like the council in the London Company, was the body to which the king addressed his instructions, if he had any to give. Its relation to the king and the privy council was direct. Its relation to the colonists was also direct, and it did not share the work of administration with the corporation, for it was the corporation.

The last distinction to be noted between the New England Council and the London Company is this: the council was a closed body, limited to forty members. Vacancies were to be filled by coöptation. It never could become, then, a large and dignified body, like that which met at Sir Thomas Smith's and John Ferrar's. Its records,<sup>1</sup> so far as they have been preserved, show that rarely more than half a dozen members attended its meetings. The only two who were regularly present were Sir Ferdinando Gorges and Dr. Barnabee Gooch. Though the council was located at Plymouth, its meetings were usually, if not always, held in London. These meetings were not called general courts, and were not such, for this

<sup>1</sup> Proceedings of the American Antiquarian Society, 1867.

corporation had no generality. There were no ordinary courts. The only executive officer mentioned in the charter is the president. He was elected by the body he served and from its members. His duties, so far as they appear in the charter, were to call meetings of the council and to assist in administering the oaths. The records show that the title of the office was later changed to governor;<sup>1</sup> and, when Sir Ferdinando Gorges held the position, we may believe that the policy of the council was directed by its official head. The records also reveal the fact that the council had a treasurer—for a time, Dr. Gooch—a clerk and auditors; and show that committees were appointed to facilitate its work.<sup>2</sup> A body so small as the council needed but little administrative machinery. But as time passed it became even smaller. In November, 1632, its members had been reduced from forty to twenty-one,<sup>3</sup> and it was resolved that the number “be with all convenient speed filled”; but there is no evidence that this was done. The New England patentees, moreover, were nobles and country gentlemen of the west of England—landed proprietors; the merchant element was almost wholly lacking. As the attendance and membership fell off, the council became more and more like a board of proprietors. Because its membership was limited to forty, and none of those intended ever to settle in New England, all the colonists under this system must be tenants or simply inhabitants. They could never become members of the governing body. The council, in other words, could never expand into a commonwealth. On the other hand, year by year it degenerated toward a proprietorship; and in fact that was the governmental form which it most resembled, and toward which the inclinations of its members naturally gravitated. In the manifesto of the council issued in 1622, and commonly known as Gorges’s *Brief Relation*, the monarchical theory of government was strongly asserted, and a scheme of administration outlined which was clearly provincial, *i.e.*, monarchical in its character.<sup>4</sup> The language of the document is as follows:

<sup>1</sup> Records, p. 59.

<sup>2</sup> *Ibid.*, pp. 59, 60, 62.

<sup>3</sup> *Ibid.*, p. 110.

<sup>4</sup> Baxter, Gorges, vol. i, pp. 234 *et seq.*

As there is no Commonwealth that can stand without government, so the best governments have ever had their beginnings from one supreme head, who both disposed of the administration of Justice, and execution of publick affaires, either according to lawes established or by the advice, or counsell of the most eminent, discreetest, and best able in their kinde.

After a brief description of the administrative organization of England, the writer continues :

This foundation being so certaine, there is no reason for us to vary from it, and therefore we have resolved to build our Edifices upon it, and to frame the same after the platforme already layd, and from whence we take our denomination.

Then follows the sketch of a governmental system which is English and feudal in every point.<sup>1</sup>

When, in 1622,<sup>2</sup> the procuring of a new patent was under discussion by the council, it was proposed to change the grant into a proprietorship. "Not to make a corporation," it was said, "but to take the land to us and our heirs." When ten years later the question of a new patent came up again, it was agreed that a copy of the charter for Maryland, recently granted to Lord Baltimore, should be given to Sir Henry Spelman for his use in preparing the draft.<sup>3</sup> The grants made by the council were in nature feudal principalities, and this was the form given to the division of its territory when it resigned its charter in 1635.<sup>4</sup>

Such were the characteristics of the London Company and the New England Council. Both were corporations, pursuing kindred objects. Both developed out of the system of 1606: the former by emphasizing the element of the business corporation,

<sup>1</sup> In this connection it is also worthy of note that in the patent issued in 1621 to John Pierce and his associates of the colony of New Plymouth, a rent of 2s. for every hundred acres of land granted was reserved by the council. This sum was to be paid annually to its "rent gatherers." 4 Mass. Hist. Coll., vol. ii, p. 160. A similar provision appears in other patents issued by the council. See Records of the Council, pp. 97-105. See also Jenness, Docs. relating to New Hampshire, p. 12. <sup>2</sup> Records of Council, p. 66. <sup>3</sup> *Ibid.*, pp. 68, 90, 111.

<sup>4</sup> A list of these grants is given by Samuel F. Haven in Massachusetts and its Early History (Lowell Institute Lectures), p. 152. A less complete list is in Palfrey, vol. ii, p. 397.

which was only germinal there; the latter by continuing that of the governmental council in great prominence, carrying on, that is, to another stage of development the conciliar side of the system of 1606. The one, true to its nature, was an open body, admitting shareholders freely and without limit; the other, also self-consistent, was a closed body, becoming smaller as time passed. The one was able to command large capital and much of the best energies of the nation; the other was poor and unsuccessful from the outset. The one, for reasons largely beyond its control, was destroyed by the crown; the other voluntarily resigned its charter. It was possible for a corporation organized according to the London plan to expand into a colony or commonwealth. This could be done, providing it were properly located, by the admission of new members and by a modification of its aims and policy. But a corporation organized like the New England Council could do no such thing. If it attempted this, it must be as a board of proprietors resident in the colony.

In reviewing the development of colonial government, we have now reached the time when the corporation was to be merged in the colony. This was effected in one case, that of Massachusetts, by the transfer of the corporation to the colony; and in the other cases, those of Connecticut and Rhode Island, by the creation of corporations on the place. The development of colonizing companies within England was at an end. We have found two types, and no others were produced. The Georgia Trustees were a corporation organized after the London pattern; but, since they remained resident in England, their colony was, as we shall see, in essentials proprietary. When it later appeared desirable to create a corporation which should become one with the colony, it is not difficult to see which of the two existing types would be selected.

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